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THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1786

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

V

CARMEN REYES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION FIRST DEPARTMENT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether a federal question is presented by this petition in light of the fact that the decision below was properly based on New York State Law; and

II

Whether, under New York State Law, in searching respondent in the lobby outside the subject apartment, the police exceeded their grant of authority, as reflected in the search warrant for 1665 Grand Concourse, Apartment B.

No. 94-1786

In the

Supreme Court of the United States

October Term, 1994

THE PEOPLE OF THE STATE OF NEW YORK

Petitioner

vs.

CARMEN REYES

Respondent.

On petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, CARMEN REYES, respectfully requests that this Court deny the petition for Writ of Certiorari submitted by Petitioner, THE PEOPLE OF THE STATE OF NEW YORK.

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department affirmed the order of the Supreme Court, Bronx County, which granted defendant - respondent's motion to suppress physical evidence as the residential search warrant did not name defendant, nor did the police observe any connection between defendant and the premises in question. Additionally, the police were not justified in the interest of safety in executing the warrant, in detaining defendant after the search warrant was, in fact, executed. The Order of the Supreme Court of the State of New York, Bronx County, dated December 3, 1993, is reproduced in THE PEOPLE OF THE STATE OF NEW YORK'S petition for Certiorari (App. D, 59).

Opinion of the Supreme Court of the State of New York, Appellate Division, First Department, People v. Carmen Reyes, A.D.2d (1st Dept. 1994), slip op. 12/22/94, and the Order of the New York Court of Appeals denying leave to appeal, People v. Carmen Reyes, N.Y.2d (1995) decided on January 31, 1995, are reproduced in THE PEOPLE OF THE STATE OF NEW YORK'S petition for Certiorari. (App. A and B, 11-14).

STATEMENT OF JURISDICTION

Respondent disputes that this court has jurisdiction to review this petition under 28 U.S.C. Sec. 1257(3) as argued in the reasons for denying the writ.

STATEMENT OF THE CASE

On October 8th, 1993, Respondent was indicted by the Grand Jury of Bronx County for Criminal Possession of a Controlled Substance in the Second Degree, and related charges. By an Omnibus Motion dated December 8th, 1992, Respondent's trial counsel requested a hearing to consider suppression of physical evidence and property seized from the person of Respondent at the time of her arrest. In said motion, trial counsel specifically stated that "the defendants were forcibly seized and searched, in violation of their state and federal Constitutional rights." See Record on Appeal, p. 21-22. (emphasis added).

Pursuant to said motion, a hearing was held before the Honorable Lawrence Tonetti, JSC, on November 4th, 1993. The only issue at said hearing was whether or not a quantity of cocaine seized from the person of Respondent should be suppressed. (Petitioner's Writ of Certiorari, App. C, 16-17). In framing this issue for the Court, trial counsel noted that his motion to suppress the property seized from Apartment B of 1665 Grand Concourse had been denied, "except for the evidence seized from the person of (Respondent) on the grounds that there is an issue of whether the actual seizure of (Respondent) was pursuant to that search warrant and whether the search warrant authorized what

occurred as to her." (Petitioner's Writ of Certiorari, App. C, 17).

The People's only witness was Detective Milton Bonilla (Petitioner's Writ of Certiorari, App. C, 20). The detective testified that on February 6, 1992, at approximately 5 PM, he was part of a team of approximately 10 or more police officers (Petitioner's Writ of Certiorari, App. C, 28) that executed a search warrant for Apartment B of 1665 Grand Concourse, Bronx, New York (Petitioner's Writ of Certiorari, App. C, 21). It should be noted that the warrant does not provide for the arrest of any individuals, only for the search of the premises (Petitioner's Writ of Certiorari, App. C, 27).

Detective Bonilla testified that as they entered the lobby of 1665 Grand Concourse, he observed a female and a male standing there (Petitioner's Writ of Certiorari, App. C, 23, 29). These two individuals were detained as the team executed the warrant (Record on Appeal 11-12). In his testimony in the Grand Jury, Detective Bonilla twice stated that Respondent was detained due to her resemblance to a description he had received of the owner of the apartment (Petitioner's Writ of Certiorari, App. C, 35-36). See, also, Affidavit in Support of Warrant Application, Record on Appeal p. 16 ("They had been allowed into the apartment by a hispanic woman approximately 50 years old.").

At the suppression hearing, for the first time, Detective Bonilla claimed that the two individuals had been detained "for our own safety." (Petitioner's Writ of Certiorari, App. C, 23). The Detective went on to explain that his concern was that the people

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may "attack us while we are concentrating on knocking down the door" (Petitioner's Writ of Certiorari, App. C, 28). He further explained that the individuals detained are not free to leave (Petitioner's writ of certiorari, App. C, 29) for fear that they may warn someone in the apartment about the impending warrant execution (Petitioner's Writ of Certiorari, App. C, 29). Upon cross-examination, Detective Bonilla did admit that he was aware that Respondent matched the vague description of the owner of the apartment at the time he had her detained (Petitioner's writ of Certiorari, App. C, 35-36).

After executing the warrant, the detective located a picture of Respondent in the apartment. He then went back to the lobby with the photo and asked Respondent to identify herself. (Petitioner's Writ of Certiorari, App. C., 33). When she gave her name, Respondent was placed under arrest and searched (Petitioner's Writ of Certiorari, App. C, 25). A quantity of cocaine was then recovered from the person of Respondent (Petitioner's Writ of Certiorari, App. C, 25).

The hearing court ruled that the property seized from Respondent's person should be suppressed. "It seems to me that the principles...articulated by the Court of Appeals would preclude the justification for a search outside the apartment of this defendant." (Petitioner's Writ of Certiorari, App. C, 54). The Court also made reference to the fact that it believed Respondent's "constitutional rights" had been violated (Petitioner's Writ of Certiorari, App. C, 56), without specifying whether the Court believed the police actions in the instant case were a violation of

the New York State Constitution, Federal Constitution or both.

The Petitioner, THE PEOPLE OF THE STATE OF NEW YORK, appealed the decision granting the motion to suppress physical evidence as well as dismissal of the People's case against Respondent to the Supreme Court of the State of New York, Appellate Division, First Department. On December 22, 1994, the Appellate Division, First Department, affirmed the order of the Supreme Court, Bronx County (Tonetti, J.), which granted the respondent's motion to suppress physical evidence.

Petitioner, THE PEOPLE OF THE STATE OF NEW YORK, sought permission to appeal the order of the Appellate Division, First Department to the State of New York Court of Appeals said permission to appeal was denied by the Court of Appeals on January 31, 1995.

The instant appeal ensued on the motion of the People.

SUMMARY OF THE ARGUMENT

There is no federal question presented by the instant petition in that the decision below was based on New York State Law. The continued detention of Respondent was illegal and clearly a violation of the Respondent's rights under the New York State Constitution.

Further, under New York State Law, in searching Respondent in the lobby outside the subject apartment, the police exceeded their grant of authority as reflected in the search warrant for 1665 Grand Concourse, Apartment B.

The lower court correctly suppressed the drugs at issue based

on a precedent established by the New York Court of Appeals which prohibits a search of defendant without proper authority.

REASONS FOR DENYING THE WRIT

I

THERE IS NO FEDERAL QUESTION PRESENTED BY THE INSTANT PETITION IN THAT THE DECISION BELOW WAS BASED ON NEW YORK STATE LAW.

Petitioner herein urges this court to find that based upon federal interpretations of the United States Constitution, the Respondent herein was properly detained while her apartment was searched. No such interpretation is necessary under the facts of the present case.

The hearing court determined that under New York State's Law, the search of the Respondent was illegal as the State constitutional rights of the respondent were violated. (Petitioner's Writ of Certiorari, App. C, 56). The Supreme Court of New York, Appellate Division, First Department unanimously affirmed the hearing courts grant of Respondent's motion to suppress physical evidence. However, Petitioner asserts that Respondent was properly seized for "safety reasons" while her apartment was searched. Further, Petitioner asserts that the hearing court found that under the Federal Constitution, said seizure of Respondent was in violation of her federal constitutional rights. To this ruling, Petitioner ascribes error.

Petitioner is under the mistaken impression that merely because the hearing court mentioned the safety concerns of the police in detaining respondent, and because the court made an off-hand reference to a violation of Respondent's "Constitutional" rights ("we have rights and that's what this country is all about") (Petitioner's Writ of Certiorari, App. C, 55), the hearing court

supposedly based its decision on the said violation of Respondent's Federal Constitutional rights.

While it is true that the court repeatedly referenced "constitutional" rights in finding that Respondent's detention had been illegal (Petitioner's Writ of Certiorari, App. C, 55-56), it is crucial to note that the court made its ruling based upon New York State Law. There was no reference made to Federal Law at any time in the hearing court's opinion.

The hearing court referenced the New York State Court of Appeals decisions in People v. Green, 33 NY2d 496 (1974) and discussed the Court of Appeals decision in People v. Sanin, 60 NY2d 575 (1983)*. The hearing court then went on to discuss a violation of Respondent's constitutional rights by her continued incarceration during the search of Apartment B. It is clear from the context of the entire decision that the hearing court based its decision on State Law, not federal. As such, respondent disputes that this Court has jurisdiction to review this petition under 28 U.S.C. Sec. 1257(3) as argued by Petitioner.

Further, Respondent had moved for suppression of the evidence under both the federal and state constitutions (Record on Appeal, p. 22). If this court couples this fact with the plain language of the hearing court's decision, it is obvious that Federal Law was not the basis for the hearing court's decision.

The crux of the Petitioners argument on the State Court Appellate level was premised upon this Court's decision in Michigan

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* Green and Sanin will be discussed in more detail in the second point of the instant brief.

v Summers, 452 US 692 (1981). In Summers, the defendant was detained as he was leaving his apartment, brought back inside by the police, held as the apartment was searched, and then arrested after the search revealed evidence that connected the defendant to criminal activity at that location.

This Court ruled that such a detention "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant." 452 US at 703. However, a very relevant point was made in Justice Potter Stewart's dissent;

> If the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down. And if the police may seize a person without probable cause in order to "facilitate" the execution of a warrant that did not authorize his arrest, the fundamental principle that the scope of a search and seizure can be justified only by the scope of the underlying warrant has suffered serious damage. There is no authority in this Court for the principle that the police can engage in searches and seizures without probable cause simply because to do so enhances their ability to conduct investigations which may eventually lead to probable cause. See Davis v Mississippi, 394 US 721, 726-727.
>
> 452 US at 709-710.

The hearing court in the instant matter ruled that while the police may have been acting in regards to their personal safety in initially detaining the Respondent, to continue to detain her during the search of her apartment violated her rights. If such a state of affairs is permissible under federal constitutional law as explained in Summers, then the hearing court was no doubt

referencing New York State's Constitution in finding the actions of the police herein illegal.

Petitioner may argue that under New York's Constitutional Law, the Summers decision has been followed to allow forcible detentions for the safety of police officers. However, a review of New York decisions in this field reveals that New York rejects the Summers approach entirely, and has adopted the view held by the Summers dissent.

Petitioner has cited People v Soler, 92 AD2d 280 (1st Dept. 1982) as support for their belief that New York follows the rationale of Summers. However, it is clear from the facts of the Soler case that no such result is intended. Prior to execution of the warrant, the police had conducted extensive surveillance of the premises and observed defendant Soler involved in drug-related activity. While Soler was not named in the warrant, when the warrant was executed, he was found inside the premises.

The New York Supreme Court, Appellate Division: First Department ruled that Soler's detention, search and subsequent arrest were based upon probable cause independent of the warrant being executed at the time of his detention and arrest. This independent probable cause arose before the warrant was executed and was based upon the officer's surveillance. 92 AD2d at 285. This is the reason why the court noted that Soler was not "an innocent bystander" 92 AD2d at 287.

In the present case, the police had not conducted any investigation or surveillance of 1665 Grand Concourse, nor had they established who even owned the premises until after they had

executed the warrant. When the police executed the warrant, according to Detective Bonilla's testimony at the hearing, Respondent was an "innocent bystander" frozen in the lobby for safety reasons. If so, her continued detention during the search was illegal and intrusive under New York State Constitutional Law.

In People v Torres, 74 NY2d 224 (1989), two officers received an anonymous tip that an individual with a white sweater driving a black Eldorado was carrying a handgun. Defendant, who matched the description, was removed from his car and frisked. The officers also seized the defendant's bag from the front seat of the automobile, searched it, and found a revolver.

The People argued that the search of defendant's bag was justified as a safety precaution and cited the federal standard for a "stop and frisk" procedure under Michigan v Long 463 US 1032 (1983). While the court conceded that the procedure followed by the police in Torres may be allowed under current federal law, the New York State Constitution (Art. I, Sec. 12) provided more protection. Noting their willingness to decide cases based on state law in the face of more expansive federal decisions (74 NY2d at 228), the court found that the officers in Torres had exceeded their authority in searching the defendant's bag. "Any residual fear that the detectives might have had about the suspect's ability to break away and retrieve the bag could have been eliminated by taking the far less intrusive step of asking the suspects to move away from the vicinity of the car." 74 NY2d at 230.

In People v Milaski, 62 NY2d 147 (1984), two officers detained a motorist based upon that individuals suspicious conduct. The

defendant explained his conduct, yet the officer's continued to detain him. A shotgun was then recovered from the defendant's vehicle, an item which proved to have been stolen in an earlier burglary. The Court of Appeals ruled that the shotgun must be suppressed since it was discovered only after the defendant's "illegal continued detention." 62 NY2d at 156. See, also, People v Chisholm, 180 AD2d 744, 745-746 (2nd Dept. 1992) ("Although the police officers properly detained the defendant to obtain explanatory information about the vehicle's registration after he admitted breaking the window, once they determined that the vehicle had not been stolen...any further detention of the defendant was unjustified"); People v Miret-Gonzalez, 159 AD2d 647, 650 (2nd Dept. 1990) (once the information on the defendant's license and the vehicle's registration had been confirmed, there was no justification for further detaining the defendant").

Clearly, then, there is precedent under New York State's Constitution, as interpreted by the courts of New York, for both the hearing court's decision and the decision of the Supreme Court of New York, Appellate Division, First Department that the continued detention of Respondent was unjustified and illegal. Despite the reference to Summers, there is no basis to believe that the hearing court made its determination based upon federal law. A simpler and more reasonable interpretation of the hearing court's decision would be a finding that the hearing court based its decision on New York State's Constitutional Law, especially in light of the fact that New York State's law is consistent with the hearing court's decision.

Thus, the federal standards and case law cited by the Petitioner are totally inopposive and inapplicable to the instant matter. Under New York State's Law, the continued detention of Respondent during the search of Apartment B was illegal and in violation of her rights under the New York State Constitution.

This was the decision of the hearing court, and the Appellate Division, First Department. There is no reason to disturb the hearing court's findings or the New York Supreme Court, Appellate Division, First Department's decision by reinterpreting the facts under federal standards.

Therefore, this Court should deny the Petitioner's Petition for a Writ of Certiorari.

II

UNDER NEW YORK STATE LAW, IN SEARCHING RESPONDENT IN THE LOBBY OUTSIDE THE SUBJECT APARTMENT, THE POLICE EXCEEDED THEIR GRANT OF AUTHORITY AS REFLECTED IN THE SEARCH WARRANT FOR 1665 GRAND CONCOURSE, APARTMENT B

At the outset of the instant point, it should be noted that there is no dispute between Petitioner and Respondent as to the power vested in the police by search warrant #039/92. By the clear language of the warrant itself, the police were empowered "to search...and seize...property." (Record on Appeal p. 4). There is no argument promulgated by the Petitioner that the plain language of the warrant authorized the search and arrest of any individual, whether located in the apartment, or within the vicinity of the apartment.

With this fact in mind, trial counsel argued to the hearing court that the police exceeded their authority in searching Respondent in the lobby outside Apartment B of 1665 Grand Concourse. As trial counsel stated, "There is no person named in this warrant. This warrant for whatever reason, is a warrant solely for the apartment. It gives no authority to seize or search any person..." (Petitioner's Writ of Certiorari, App. C, 18-19).

In support of his arguments, trial counsel cited the Court of Appeals decision in People v Green, 33 NY2d 496 (1974). In Green, detectives had gained search warrants that authorized the search of an apartment, the person of the owner and "any other person who may be found therein" (emphasis added).

The detectives observed the defendant leave the subject

apartment. Nineteen blocks away, they stopped the defendant, advised him of the warrants, searched him, found drugs on his person, and arrested him.

The Court ruled that the evidence seized from the defendant must be suppressed.

> (I)t is apparent that the search authority requested and granted was limited to the premises where the contraband was believed to be and extended only to those individuals, including the occupant, who being found therein, might reasonably be expected to conceal the contraband on their persons. This authority to search the occupant under these circumstances is not a general warrant to search his person wherever he might be found. 33 NY2d at 499 (emphasis added, citations omitted).

The court went on to note that "the authority to search is limited to the place described in the warrant and does not include additional or different places." id at 499, citing Kenningham v United States, 287 F2d 126, 129 (1960).

To date, the Green decision reflects the state of the law in New York. Cases which have distinguished Green in recent years have done so on the basis of the more expansive language contained in the warrants at issue in those matters. See, People v Easterbrook, 35 NY 2d 913 (1974) (Distinguishable from Green since the terms of the warrant were broader than the Green warrant; hence defendant could be arrested and searched as he exited apartment).

In People v Sanin, 60 NY2d 575 (1983), the defendant was searched after he had pulled his car into the driveway of his home. The warrant in that case had authorized the police to conduct a search of the defendant's person. The Court held that the search outside the defendant's home was justified, in that "the apartment

was identified only as the locus of the sales. The activities of defendant (were) the predicate for issuance of the warrant." 60 NY2d at 577.

In the instant case, it is beyond dispute that no search of any person was authorized by the warrant. Further, the activities of the Respondent was not the predicate for the issuance of the warrant - the apartment as the locus of drugs was the predicate. In fact, the police only had a vague description of the owner of the apartment as a hispanic woman, approximately 50 years old (Petitioner's Writ of Certiorari, App. C, 24). Counsel would submit that this description fits at least one quarter of the citizens of Bronx County.*

Clearly, then, the police had no authority to search the Respondent since the warrant only gave them authority to search the apartment. If Detective Bonilla had testified before the hearing court as he had twice before the Grand Jury, the People would, in all honesty, be forced to concede the suppression of the narcotics seized from Respondent.

However, the Detective raised a new issue by asserting that he and his brother officers had detained Respondent for safety reasons; after which a search of the apartment gave the police probable cause to search the Respondent. While the hearing court saw fit to credit the detective's testimony on this point (Petitioner's Writ of Certiorari, App. C, 52), it is crucial to

* It should be noted that the hearing court also felt the description was "rather broad" (Petitioner's Writ of Certiorari, App. C, 48).

note that the hearing court did not base its decision on these grounds. The hearing court suppressed the drugs at issue in this matter based upon the Court of Appeals decision in Green, which prohibits a search of a defendant without authority. The hearing court did not base its decision on the so-called "safety" issue addressed by the Petitioner.

A review of the hearing court's oral decision can lead to no other conclusion. After a lengthy discussion of the Sanin case (cited herein), the hearing court held as follows:

> Now the distinction in (the Sanin) case is a very clear one and that is (Sanin) was a named defendant. (Respondent) was not named in the search warrant in this case. It seems to me that the principles both in Green and in this case as articulated by the Court of Appeals would preclude the justification for a search outside the apartment of this defendant.
>
> Petitioner's Writ of Certiorari, App. C, 54

Therefore, despite the fact that Petitioner has chosen to concentrate on the ober dictum of the hearing court's decision and claim that the hearing court raised a federal constitutional issue in its decision, nothing could be further from the truth. The hearing court clearly based its decision on the New York State rule of law as embodied in the Green decision, a precedent which is as strong today as when it was enunciated 20 years ago.

In fact, it should be noted that the warrant at issue in the present case is more restrictive than the warrant at issue in Green. The Green warrant allowed the search of individuals found in the premises. The present warrant is devoid of such "catch-all" language.

Thus, even if, for the sake of argument, we assume that the police were justified in initially detaining the respondent for their own safety, (a point emphatically not conceded by Respondent), their warrant did not give them the authority to arrest or search the Respondent.

Petitioner has also argued that even if this court were to find that the police exceeded their authority in searching the Respondent outside of the apartment, this court should determine that the Respondent was searched incident to a lawful arrest. See, Dunaway v New York, 442 US 200 (1979); CPL Sec. 140.50(1).

It should be initially noted that this argument was not raised by the Petitioner at the hearing. Therefore, it is clearly de hors the record and unpreserved for Petitioner review at this time. See, People v Olin, 186 AD2d 74,75 (1st Dept. 1992); CPL Sec. 470.05(2).

In any event, the Appellant has not established their requisent probable cause to arrest Respondent. The mere fact that Respondent's photograph and letters addressed to her were found within the apartment does not establish any "guilty knowledge" on the part of an individual found in the lobby of the building outside the apartment. Two other individuals were arrested inside of Apartment B of 1665 Grand Concourse. A reasonable view of the evidence could lead the Court to find that the handgun and drug paraphernalia found in the apartment belonged to the two individuals found in the apartment. There was no proof submitted by the Petitioner to show that Respondent had any knowledge of drug

related activities in Apartment B.* Thus, Petitioner cannot establish the probable cause for the arrest of Respondent merely because her picture was in the apartment.

Therefore, based upon both the clear language used by the hearing court, as well as the New York State Supreme Court, Appellate Division, First Department's reliance on New York State Law as embodied in Green, this court should affirm the suppression of the property recovered from respondent due to the violation of New York Constitutional Law and as such deny the petitioner's request for a Writ of Certiorari.

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* It should be noted that although the People have included the warrant application with its description of a hispanic woman in her 50's as the owner of the apartment, in the Record on Appeal, (RA, pp. 5-8), at no time was this application made available to the hearing court. (Petitioner's Writ of Certiorari, App. C, 18-19). Thus, the application should properly be considered de hors the record since it was not available to the hearing court.

CONCLUSION

The Respondent, CARMEN REYES prays that the Court deny the People of the State of New York's petition for a Writ of Certiorari, because the case presents no issues appropriate for the court's review, and because the lower court's holdings were not in error.

Respectfully submitted,

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